

STATE OF MISSOURI, ex rel. )  
TRACI STUBBLEFIELD, )  
) )  
Appellant-Relator )  
) )  
v. ) Cause No. SC83858  
) )  
THE HONORABLE )  
CAROL KENNEDY BADER, )  
Juvenile Judge of the Twenty-Third )  
Judicial Circuit of Missouri, )  
) )  
Respondent )

**RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT  
IN OPPOSITION TO PERMANENT WRIT OF PROHIBITION**

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## **JURISDICTIONAL STATEMENT**

Respondent adopts the Jurisdictional Statement offered in Relator's brief.

## **STATEMENT OF FACTS**

The Juvenile Officer filed petitions under Section 211.031.1.(1), RSMo. for neglect and abuse with regard to Traci Stubblefield's, the Relator herein, three children on February 16, 2001. On that date, the matter was set for hearing on April 30, 2001. (Ex.D). Relator, the mother, was served with summons on February 22, 2001. The summons included notice of the hearing date of April 30, 2001 and of the designation of the Honorable Carol Kennedy Bader as trial judge. (Ex.1). Pursuant to Supreme Court Rule 128.15, the summons included the language, "You are ordered to appear before this Court at Hillsboro, Missouri on the 30<sup>th</sup> day of April, 2001 at 10:00a.m. In [sic] Division 10, for a hearing on the Petition" and "If at the first hearing the allegations in the petition are denied, the court may set this case for trial at a later date." (Ex. 1, pp1-6).

Judge Bader held a temporary Protective Custody Hearing on February 22, 2001 and Relator was present. (Ex. O, pp. 1, 5 and 9). On February 23, 2001, Judge Bader appointed counsel for Relator Stubblefield and her counsel entered her appearance on March 2, 2001. (Ex. K; Ex. L.). At the hearing on April 30, 2001, the father of two of the children failed to appear and Respondent took default jurisdiction with regard to him. Relator appeared, denied the allegations of the petitions and requested a contested hearing via a locally created and used document entitled "Request for Trial Setting". (Ex.B; Ex. O, pp.3, 7 and 12). The court granted Relator's request and set the matter for contest on August 20, 2001.(Ex. B). On that same date, April 30, 2001, after the hearing, Relator filed a memorandum requesting a change of judge alleging that said request was pursuant to Supreme Court Rules 51.05 and 126.01.(Ex. A.). Respondent denied Relator's application, writing on the memorandum: "Request denied. Court has already taken jurisdiction over the juveniles

by virtue of judgment entered April 30, 2001. So ordered. Carol Bader 4/30/01". (Ex. A.).

**POINT RELIED ON**

**THE COURT DID NOT ERR IN OVERRULING RELATOR'S MOTION FOR CHANGE OF JUDGE BECAUSE SUCH REQUEST WAS UNTIMELY IN THAT IT WAS NOT MADE FIVE DAYS AFTER THE SUMMONS SET FORTH THE TRIAL DATE.**

MO. REV. STAT. § 530.010 (2001)

Missouri Supreme Court Rule 126.01 (2001)

Missouri Supreme Court Rule 51.05 (2001)

In the Interest of M.S.M. 666 S.W.2d 800, 804 (Mo. App. W.D. 1984)

In the Interest of C.L.L. 776 S.W.2d 476, 477 (Mo. App.E.D.1989).

In the Interest of W.S.M., 845 S.W.2d 147, 152 (Mo. App. W.D. 1993)



## **ARGUMENT**

**THE COURT DID NOT ERR IN OVERRULING RELATOR'S MOTION FOR CHANGE OF JUDGE BECAUSE SUCH REQUEST WAS UNTIMELY IN THAT IT WAS NOT MADE FIVE DAYS AFTER THE SUMMONS SET FORTH THE TRIAL DATE.**

Respondent agrees that prohibition, although an extraordinary remedy, is proper in the event that she usurped judicial power or exceeded her jurisdiction. MO. REV. STAT. § 530.010 (2001) and Noranda Aluminum Inc. v Rains, 706 S.W.2d 861(Mo. banc 1986). She denies that she has done so.

So long as Respondent's ruling is proper on any tenable basis, it should be sustained. Ledbetter v. Director of Revenue, 950 S.W.2d 656, 659 (Mo. App.1997). Respondent agrees that jurisdiction by means of default hearing on the father of two of the three children involved was all that was taken on April 30, 2001 and that her notation on Relator's application for change of judge makes reference to that jurisdiction. However, Relator only speculates that Respondent's notation was intended as the sole reason for denial of her request. Contrary to Relator's suggestions otherwise (*see* Relator's brief, p 16), Respondent is not required to give any reason for her ruling. Even if, *arguendo*, the trial court had provided an erroneous reason for a ruling, what is pertinent is the "correctness of the trial court's result, not the route taken to reach it." Ledbetter v. Director of Revenue, 950 S.W.2d 656, 659 (Mo. App.1997)

(quoting Kopps v. Franks, 792 S.W.2d 413, 419(Mo.App.1990)). By implication, a proper ruling means that Respondent did not exceed her authority.

The merits of Relator's petition for writ, then, turns on whether her application for change of judge was timely. If her application was not timely made, Respondent properly denied it. Relator made her request for change of judge pursuant to Supreme Court Rules 51.05 and 126.01. (Ex. A). Rule 51.05 does not apply as this is a juvenile matter and references to Rule 51.05 are not made in the current Rule 126.01.<sup>1</sup> The relevant sections of MO.S.CT.R. 126.01 read as follows:

“a. A change of judicial officer of the court shall be ordered:

(1) when the judicial officer of the court is interested, related to a party, or otherwise disqualified under Rule 51.07; or

(2) upon application of a party. The application need not allege or prove any cause for such change of judicial officer and need not be verified.

*b. The application must be filed within five days after a trial date has been set, unless the trial judicial officer has not been designated within that time, in which event the application must be filed within five days after the trial judicial officer has been designated. If the designation of the trial judicial officer occurs less than five days*

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<sup>1</sup> Rule 51.05 requires application for change of judge in a civil matter to be filed "within sixty days of service of process or thirty days from the designation of the trial judge...." Even under this more liberal rule, Relator's request is not timely in that the trial judge had been designated for seventy-three days and process had been served

before trial, the application must be filed prior to commencement of any proceedings on the record. (Emphasis added)".

Because Relator does not contest that she knew the identity of the judicial officer from the onset (*see* Relator's brief p.12), the question of whether or not Relator's request was timely turns on when the "trial date" was set. The question at bar is what date *is* the "trial date". The juvenile court correctly maintained that the "trial date" for purposes of change of judge is the date for hearing set forth on the summons. Relator, without citation to any authority, argues that the date in the summons was "merely an announcement" and that the "trial date" is August 20, 2001. *See* Relator's brief, pp.12-13. It is the *setting* of the "trial date", plus five days, excluding weekends and holidays, that determines whether or not a request for change of judge is timely. MO.S.CT.R. 126.01 (2001); MO.S.CT.R. 44.01 (2001). If, as Respondent maintains, the "trial date" is April 10, 2001, Relator's ability to make timely application for change of judge expired on February 26, 2001.<sup>2</sup> Relator argues that she had until May 5, 2001, or five days after April 30, to timely apply for change of judicial officer because on April 30 the August "trial date" was set. *See* Relator's brief, p. 14.<sup>3</sup>

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sixty-seven days when she finally made her application. MO.S.CT.R. 51.05 (2001).

<sup>2</sup> This is calculated by adding the five days specified by Rule 126.01 and excluding the days required under Rule 44.01 to February 16, 2001, the date that summons was issued and the date that the hearing date in the summons was set.

<sup>3</sup> Had she correctly applied Rule 44.01, under Relator's interpretation of "trial date", that time would have been extended to May 8, 2001.

Respondent's interpretation of what constitutes a "trial date" for purposes of change of judge is consistent with case law. In the Interest of M.S.M. 666 S.W.2d 800, 804 (Mo.App. W.D. 1984) specifically calculates the beginning of the period from which a trial judge, if his or her identity is known, may be disqualified without cause from the date that the summons was issued. "[The mother] had to apply 'within five days after the trial setting date had been made,' *that is, within five days of the issuance of summons* in this case. (Emphasis added)" Id. at 804. The language "in this case" in this quotation only refers back to a previously cited provision in Supreme Court Rule 51.05(b) that was inapplicable.<sup>4</sup> M.S.M. at 803, 804. Clearly, in M.S.M. the "trial date" is the date set forth in the summons. Id.

Following this reasoning, in an Eastern District juvenile case, C.L.L., the court ruled that a father's oral motion for change of judge under Rule 126.01(b) was untimely when made the day of trial; the father in C.L.L., like Relator, also requested a hearing at a later date. In the Interest of C.L.L. 776 S.W.2d 476 at 477 (Mo. App.E.D.1989). In C.L.L., there is no indication that the "trial date" was any other date than the date that appeared on the summons. Id.

In a Western District case, W.S.M., the calculation for timeliness of application is specified as the date the Court Hearing Notice was sent to the parties. In the Interest of W.S.M., 845 S.W.2d 147, 152 (Mo.App. W.D. 1993) This is analogous to the

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<sup>4</sup> This rule is cited because at that time Rule 126.01 required making application for change of judge under Rule 51.05 –see Id. at 803.

issuance of summons because the notice, like the summons, informed the parties of the hearing date and designated the judge. *Id.* As is logical in an application for change of judge, what is important is when the identity of the trial judge is known to the parties. State ex rel. Burns v Goeke, 884 S.W.2d 60, 62 (Mo.App.E.D.1994).

In the causes at bar, each summons provided April 30, 2001 as the date for hearing and designated the division in which the parties were compelled to personally appear. Pursuant to Supreme Court Rule 128.15, each included the statement: "If at the first hearing the allegations in the petition are denied, the Court *may* set this case for trial at a later date. (Emphasis added)." (Ex.1). Respondent was not *compelled* to set the matter for contested hearing at a later date. The court in M.S.M. did not. In the Interest of M.S.M. 666 S.W.2d 800, 802 (Mo.App. W.D. 1984). Wisely, Missouri law grants discretion to its trial judges to manage their dockets as best they can. This flexibility is particularly important in juvenile court. As pointed out in M.S.M., "[I]n a juvenile court matter...time is of the essence, and the court must proceed as speedily and as promptly as possible." *Id.* at 804.

On April 30, 2001, the date provided in the summons, the trial court took default jurisdiction with regard to the father of two of the children as Respondent noted in her denial of Relator's application.(Ex.A). With regard to Relator, Respondent continued the matter for contested hearing, setting it for trial at a later date in August. To succeed in her argument that April 30, 2001 did not constitute a "trial date" for purposes of Rule 126.01, Relator must depict that date as something else. Her argument is that April 30, 2001 "the date on the summons and petition served on

Relator was merely an announcement date". (Relator's brief, p.13). She states that the interpretation of timeliness in M.S.M. is "inapplicable to the case at hand" because Mrs. M. appeared and testified.(Relator's brief, p 13). Because Respondent reset the juvenile causes for contested hearings, Relator argues that the hearing date in the summons is not "trial date" for purpose of Rule 126.01 In essence, Relator's argument is that the title of a locally drafted document both deprives Respondent of her option to conduct a full hearing on the date set forth in the summons and suffices to dramatically extend the time for change of judge in the case from February 26, 2001 to May 5 or 8, 2001. Under Relator's interpretation, local practice governs determination of timely application for change of judge. Her interpretation evokes the specter of unique rules in each of Missouri's forty-five judicial circuits, and perhaps even for each juvenile court judge within the circuit.<sup>5</sup>

Under Relator's interpretation of Rule 126.01, she can delay request for change of judge until a "second" trial date is set. Such a position is inconsistent with notions of fairness or the overriding concern with a speedy disposition in her juvenile case. Had Relator been concerned with fairness, she would have exercised her right to speedy change of judge at the earliest opportunity. The record is devoid of any rationale for Relator to seek a second opportunity to recuse the court.

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<sup>5</sup> Her interpretation also would allow a party to "wait and see" if any other party would also contest the allegations before strategically attempting to place themselves in a better or different position before a different judicial officer.

Relator's argument that the date set forth in the summons should be ignored unless an evidentiary hearing with regard to the party requesting change of judge takes place is contrary to case law. Logical extension of Relator's interpretation would wreak havoc with uniform application of Rule 126.01 throughout the state. Further, her interpretation undercuts the intent of Supreme Court Rule 119.01 which specifies that the "date for the hearing to adjudicate the petition shall be set" "[a]s soon as practicable after the petition is filed". MO.S.CT.R. 119.01. At the time that Relator finally requested a change of judge, the April 30, 2001 hearing date had been set for seventy-three days. Relator had known, via service of summons, for sixty-seven days that she was compelled to appear before Judge Bader "for a hearing". (Ex. 1). She had appointed counsel who had known both the designation of the trial judge and the date for hearing for more than two months. Further, by April 30, 2001, Relator had already appeared before Judge Bader, who, as evidenced by Relator's numerous exhibits, was familiar with the situation of the children in the juvenile cases and, as her notation to Relator conveyed, had taken jurisdiction with regard to the father of two of the children.

In the causes at bar, Relator was obligated to appear, however Respondent, at her discretion and in the interest of expediting her docket and avoiding inconvenience to multiple witnesses, set the matter for contest at a later date with regard to Relator. Her decision to not hold a full evidentiary hearing with regard to Relator on the day set forth in the summons for hearing is irrelevant to the determination of timeliness for making application for change of judicial officer. Notwithstanding that no evidentiary

hearing with regard to Relator took place on April 30, 2001, that date, consistent with case law, remains "the trial date" for purpose of calculation of timely application for change of judge. To hold otherwise, makes a mockery of the timeliness requirements of Rule 126.01 and is at odds with the entire impetus in juvenile court to expedite proceedings. *See* MO.S.CT.R.119.01.

Respondent is wholly in agreement with the principles of fairness and justice so eloquently expressed in State ex rel. B.C.C. v. Conley, 568 S.W.2d 605, 608 (Mo.App. W.D. 1978), and the other cases cited in Relator's brief. However, Relator is bound by the timeliness requirements of Rule 126.01. An unprecedented interpretation of what constitutes the setting of a trial date under Rule 126.01 does not suffice to relieve Relator of the obligation to timely make her application. "While the rule allowing a party to disqualify a judge should be liberally construed in favor of the right to disqualify, *In re Estate of Boeving*, 388 S.W.2d 40, 50 (Mo.App.1965), the court must weight the effect of liberalizing such a rule on the rights of the various parties and the type of proceeding involved." M.S.M. at 804. No request for change of judge was filed for seventy-three days after the issuance of summons, the "trial date" as defined in case law. Judge Bader rightly denied Relator Stubblefield's request because it was grossly out of time. In so doing she acted both within her jurisdiction and in compliance with her obligation "to expedite in every way possible and with all deliberate speed [juvenile court proceedings] to minimize the harm to children whom must remain in limbo while the judicial system runs its course." In the Interest of D.G.N. 691 S.W.2d 909 at 914.



## **CONCLUSION**

Respondent rightly denied Relator's application for change of judge in that it was not timely filed. The "trial date" as interpreted by relevant case law was set on February 16, 2001 when the summons was issued which specified the date of hearing and the designation of the trial judge. Any application made after February 26, 2001 was untimely. In denying Relator's application filed seventy-three days later after issuance of summons, Respondent did not exceed her authority. Wherefore, Respondent prays that the preliminary order in prohibition be set aside and that this Court deny Relator's petition for a permanent writ of prohibition.

AFFIDAVIT OF SERVICE OF RESPONDENT'S BRIEF

STATE OF MISSOURI            )  
  )     SS.  
COUNTY OF JEFFERSON        )

SUSAN K. NUCKOLS, being first duly sworn, does state that on the 29<sup>th</sup> day of October, 2001, two (2) copies on paper and one (1) copy on disk of the foregoing Relator's Brief were mailed by United States, Mail, postage prepaid to:

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Subscribed and sworn to before me this 29th day of October, 2001.

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Lynn Pashia – Notary Public

AFFIDAVIT OF COMPLIANCE

STATE OF MISSOURI            )  
  )       SS.  
COUNTY OF JEFFERSON        )

Susan K. Nuckols, being first duly sworn, does state as follows:

1. That Respondent's Statement, Brief, and Argument in Opposition to Permanent Writ of Prohibition complies with the limitations set forth in Missouri Supreme Court Rule 84.06(b);
2. That the number of words in the Relator's Brief In Support of Petition for Writ of Prohibition is 3166;
3. That the disk of the Relator's Brief In Support of Petition for Writ of Prohibition has been scanned for virus and is virus-free.

Susan K. Nuckols MBE 43199

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P.O. Box 100  
Hillsboro, Missouri 63050  
(636) 797-6059

Subscribed and sworn to before me this 29th day of October, 2001.

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Lynn Pashia – Notary Public